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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1129 311

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the Supreme Court of Illinois (App. A, pp. 19-33 below) is reported at 34 Ill. (2d) 164, 214 N.E. 2d 755.

Jurisdiction

This action was brought against appellant to collect taxes alleged to be due from appellant under the Illinois Use Tax Act, as amended (Ill. Rev. Stats. [1963], ch. 120, §§ 439.1 *et seq.)* and pertinent provisions of the Illinois

Retailers' Occupation Tax Act, as amended (Hl. Rev. Stats. [1963], ch. 120, §§ 440 *et seq.*)

The judgment of the Supreme Court of Illinois was entered on January 25, 1966. A petition for rehearing was denied on March 23, 1966 and the mandate was issued March 29, 1966. (App. B, pp. 34-35 below.) The notice of appeal was filed in the Supreme Court of Illinois on April 22, 1966.

Jurisdiction is conferred on this Court to review the judgment by 28 U.S.C. 1257(2) and 2101(c). The following cases sustain the jurisdiction of this Court: *Connecticut General Co.* v. *Johnson*, 303 U.S. 77; *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340; *Scripto, Inc.* v. *Carson*, 362 U.S. 207; *American Oil Co.* v. *Neill*, 380 U.S. 451.

Question Presented

Whether it violates the commerce clause and the Fourteenth Amendment for a State to make an out-of-State mail order house, with no property, offices, warehouses, agents or other representatives within the jurisdiction, liable for the collection and payment of a tax levied upon its customers' local use of goods where its only contact with the State is (a) addressing catalogs to local residents through the United States mail and (b) sending merchandise to local customers by mail or common carrier.[1]

[1] The notice of appeal correctly indicates that the issue here discussed as a single question is analytically divisible into three parts: (1) the constitutionality of requiring the appellant to collect the tax under the Fourteenth Amendment; (2) the constitutionality of the same requirement under the commerce clause; and (3) the constitutionality of entering a judgment imposing liability *in personam* for the amount of the tax upon an out-of-State seller served only by leaving a copy of the summons with the Secretary of State and by mail. We reserve the right to break the analysis into its component parts in any argument on the merits. However, regardless of the details of the analysis, there is essentially only one question and we discuss it here as a unit.

Statutes Involved

The Illinois Use Tax Act, section 2, as amended by the Act of July 17, 1961 (Ill. Rev. Stats. [1963], ch. 120, § 439.2) provides in critical part—

> "Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer:
>
> 1. ....
>
> 2. Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Section 3 (Ill. Rev. Stats. [1963], ch. 120, § 439.3) provides in pertinent part:

> The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State . . . and remitted to the Department. . . .

Section 12a (Ill. Rev. Stats. [1963], ch. 120, § 439.12a) provides:

> *Appointment of secretary of state for service of process—Force and effect of service.* Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under

this Act as a seller and who subsequently removes from this State or conceals his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit.

Related sections of the Illinois Use Tax Act are reprinted in Appendix C, pp. 36-44 below.

Statement

1. *The Illinois Use Tax*

Since 1955 Illinois has levied a use tax upon the privilege of using in Illinois "tangible personal property purchased at retail . . . from a retailer." Ill. Rev. Stat. [1963], ch. 120, § 439.1 *et seq.* The statute provides that the use tax shall be collected from the purchaser by any retailer "maintaining a place of business in this State," and makes the obligation a debt of the retailer regardless of whether the tax is actually collected *(Ibid.)*

The term "retailer maintaining a place of business within this State" was originally given a conventional meaning requiring some local establishment such as an office, distribution house, sales house or warehouse. On July 17, 1961 Illinois expanded the term "maintaining a place of business' artificially to include (Ill. Rev. Stat. [1963], ch. 120, par. 439.2)—

> Engaging in soliciting orders within this State from users by means of catalogs or other advertising, whether such orders are received or accepted within or without this State.

Illinois also added to the Use Tax Act a new Section 12a providing that any non-resident "who accepts the privilege . . . of acting as a retailer maintaining a place of business in this State" shall be deemed to appoint the Secretary of State his agent for the service of process in any proceeding under the Act. Service was to be made by delivering a copy to the Secretary of State and mailing a copy to the taxpayer. Ill. Rev. Stat. [1963], ch. 120, par. 439.12a.

2. *Appellant's Business*

The new, artificial definition brought appellant within the reach of the statute, if constitutional. Appellant is a national mail order concern incorporated in Delaware, whose only offices and warehouse are located in Missouri (R. 91, 95, 186, 187).[2] Twice a year appellant mails catalogs from Missouri to a list of over five million customers resident throughout the United States (R. 186-187). It also mails out and encloses in merchandise smaller intermediate sales books and flyers (R. 188). All orders are received and accepted in Missouri (R. 188-189). All goods are shipped from outside Illinois either by mail or common carrier (R. 188-189).

Appellant has no other contact with Illinois. It is qualified to do business only in Delaware and Missouri. It has never registered with the Illinois Department of Revenue under the Use Tax Act. As noted by the court below, it "does *not* maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does *not* have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments or to service merchandise it sells; it does *not* own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has *not* advertised its merchandise for sale in newspapers, on billboards or by radio or television in Illinois" (App. A, p. 20 below, emphasis added).

On January 21, 1963 appellee issued a proposed assessment in the sum of $74,593.75 for "delinquent" Use Taxes for the period July 17, 1961 through October 31, 1962, plus a 25 percent penalty of $18,648.43, for a total of $93,242.18. The period of the assessment thus began the day of the

[2] The reference "R." followed by a number is to the original record certified from the Supreme Court of Illinois, as paginated for this Court.

enactment of the critical amendment to the Use Tax Act and included sales based upon catalogs distributed prior to the amendment. Defendant declined to pay (R. 3, 6, 104).

3. *Proceedings Below*

This action was thereupon instituted by appellee in the Circuit Court of Cook County on October 15, 1963 to recover from appellant the use taxes assessed as above (R. 1-10). Service was made by leaving a copy of the summons and complaint with the Illinois Secretary of State and mailing a copy to appellant in Missouri in accordance with the 1961 amendment to Section 12a of the Illinois Use Tax Act (R. 33-34).

By special appearance appellant challenged, under the Fourteenth Amendment, the power of the circuit court to render an *in personam* judgment on the basis of such substituted service and notice by mail to a defendant whose only contact with Illinois was sending catalogs, advertising flyers and merchandise into the State from outside the jurisdiction (R. 43, 44, 50, 51). Although the motion to quash the process was denied, appellant preserved its objection to the jurisdiction throughout the proceedings in the Illinois courts (App. A, pp. 21, 22, 27, 31 below).

By its motion to strike or dismiss the complaint (R. 67, 75, 77, 82, 83, 86, 87) and again by its answer (R. 93, 94), appellant raised the constitutional contention that the Use Tax Act, insofar as it makes appellant liable for the use tax upon Illinois purchasers, is: (i) a denial of due process of law under the Fourteenth Amendment because appellant has not sufficient minimum relation to Illinois to furnish jurisdiction to regulate or tax; and (ii) violative of the commerce clause because requiring appellant to collect the tax imposes an undue burden upon interstate commerce.

The circuit court entered summary judgment on motion of appellee (R. 196-197), and appellant appealed (R. 199 *et seq.*).

The Supreme Court of Illinois considered and specifically rejected appellant's three claims under the United States Constitution. It put its decision squarely upon the ground that (App. A, p. 26 below)—

> the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogs and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders [by such catalogs and advertising] followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

The Question Is Substantial

This appeal squarely presents the question whether a State may constitutionally require an out-of-State business to collect and pay the taxes levied on its residents' subsequent use of the goods where the out-of-State business has only two points of contact with the jurisdiction: (1) it regularly mails catalogs and flyers soliciting mail orders into the State as part of a nation-wide distribution and (2) it ships goods which it has sold into the State by mail or common carrier. The Supreme Court of Illinois rested jurisdiction to tax solely upon those two facts. Its novel ruling goes beyond any decision of this Court sustaining

the imposition of liability upon out-of-State concerns, and is inconsistent in principle with *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340. The decision is squarely opposed to the only other ruling upon the question. *State* v. *Lane Bryant, Inc.*, 277 Ala. 385, 171 So.2d 91 (1965). If allowed to stand, it is bound to proliferate changes in sales and use tax legislation and administrative practice in other States making thousands of mail order businesses, large and small, into collection agents for States and localities scattered all over the country with which they have not the least connection save that they deal with residents of the States by mail and common carrier through the channels of interstate commerce. The Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee reported that the issue involved in this case—"whether a State may require a seller to collect its use tax where the only contacts with the State are the dissemination of advertising and the shipment of goods into the State by mail or common carrier"—is perhaps "the most important jurisdictional uncertainty at present," observing that "this question has not yet been decided by the United States Supreme Court" (H. Rept. 565, 89th Cong. 1st Sess., p. 627). The *Report*[3] also refers to "the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a series of local procedures and rules likely to be ill-designed for his business and at variance with the practice of other States where he is collecting tax" (*Id.* at 884). This appeal, therefore, presents a constitutional issue deserving plenary consideration.

1. The decisions of this Court under the due process

[3] We use the abbreviation "Report" to refer to the exhaustive study submitted by a Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee as H.Rept. 565, 89th Cong., 1st Sess. Part III, pp. 603-899, deals with sales and use taxes.

and commerce clauses have firmly established the doctrine that "when a tax is imposed on an out-of-State vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax" (*American Oil Co.* v. *Neill*, 380 U.S. 451, 458). There must be "some definite link, some minimum connection, between a State and the person, property or transaction it seeks to tax" *(Ibid)*. The fact that the vendor knows that goods are destined for use within the taxing State is not enough to validate tax liabilities directly imposed upon or resulting from out-of-State sales which are otherwise insufficiently related to activities within the taxing State on the part of the vendor. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (use tax); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (gross receipts tax); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (sales tax).

Up to now the test has been whether the out-of-State concern is present or has property or representatives carrying on its business within the taxing State. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, illustrates the principle. There the Court held that an out-of-State vendor could not be required to collect the use tax levied by another State upon its own residents merely because the vendor's dissemination of advertising, including regular mailings four times a year, was addressed to prospective customers within the State and the vendor delivered goods there. In *Miller Bros.* the Maryland purchasers traveled from their residences to the Delaware store whereas here the Illinois residents send their orders by mail to the appellant's Missouri offices and warehouse. The difference between a mail order and personal travel can hardly be relevant, however, for in both cases the transaction is completed outside the State by use of the channels of interstate commerce. The volume of business was smaller in *Miller Bros.* than here, but nothing in the stipulation of

facts suggests that it was less regular. In *Miller Bros.* some of the goods were picked up by customers at the out-of-State store, but that was not true of the greater part—66 percent—of the business. The *Miller Bros.* decision, therefore, seems necessarily to hold that the regular solicitation of orders by the dissemination of general advertising, followed by delivery to local customers, is not sufficient to give a State jurisdiction to require the out-of-State vendor to collect a tax on the in-State customers' subsequent use of the goods. That holding is dispositive of the present case.

The mere solicitation of business from outside the State, followed by interstate delivery to local customers, however regular, has never been held a sufficient nexus. *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 and *Nelson* v. *Montgomery Ward & Co.*, 312 U.S. 373, decided that a State may require an out-of-State seller to collect the use tax levied upon local mail order buyers where the seller also maintains local retail stores enjoying the protection and services of the government to the support of which it is asked to contribute by serving as a collection agency. The Court distinguished "out of State mail order houses" on the ground that they "are not receiving benefits from Iowa for which it has the power to exact a price" (312 U.S. at 364).[4] Later cases extended State power to situations in which the foreign corporation does only an interstate business, but none qualified the principle that jurisdiction to tax requires some presence—in person or

[4] Contrary to the suggestion of the court below the reference to local advertising of the mail order business found in the Montgomery Ward opinion (312 U.S. at 376) cannot fairly be read as an indication that advertising alone would give jurisdiction to require collection of a tax. Rather, it served to tie the mail order business to the retail stores and thus to justify the "burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business" (*Id.* at 375).

through property or representatives—within the State. In *General Trading Co.* v. *Tax Comm'n.*, 322 U.S. 335, the imposition of liability to collect a local use tax was sustained where interstate sales were developed by a force of local salesmen operating out of headquarters in a neighboring state. *Scripto, Inc.* v. *Carson*, 362 U.S. 207 applied the *General Trading* doctrine to a dealer who had "ten wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods" (p. 211). The Court found no difference of constitutional significance in the contractual tagging of the salesmen as independent contractors rather than regular employees, nor in the circumstance that they also worked for others. It emphasized, however, the importance of their "local function of solicitation" saying that the "only incidence of this sales transaction that is non-local is the acceptance of orders" (*Ibid.*).[5]

Thus, even if *Miller Bros. Co.* v. *Maryland* is not conclusive in appellant's favor, no opinion of the Court has ever gone so far as to sanction a State law requiring an exclusively mail order business, located in another jurisdiction, to collect the use taxes on local residents. The commentators agree that the decisions dealing with solicitation by local sales representatives, whether agents or

[5] The Illinois Supreme Court relied upon the individual concurring opinion of Mr. Justice Rutledge in the *General Trading* case for the proposition that "regular continuous, persistent solicitation" of local customers should be a sufficient basis for the imposition of a tax (App. A, pp. 25-26 below). But there are many forms of solicitation and the expressions were used in a case dealing with local salesmen. The point at issue was whether continuous local solicitation through salesmen should have the same legal consequences as maintaining a local sales office. There is not the slightest reason to suppose that Justice Rutledge's references to "continuous local solicitation" meant the interstate mailing of catalogs, which was not involved in the *General Trading* case, rather than solicitation by a force of salesmen, traveling and working in Iowa, which was the case before the Court.

independent contractors leave open the status of out-of-State, exclusively mail order businesses. The Special Subcommittee on State Taxation of Interstate Commerce of the House Judiciary Committee reported (H. Rept. 565, 89th Cong., 1st Sess. 627 (1965)—

> Perhaps the most important jurisdictional uncertainty at present is whether a State may require a seller to collect its use tax where the only contacts with the State are the dissemination of advertising and the shipment of goods into the State by mail or common carrier. This question has not yet been resolved by the United States Supreme Court.

See also Kust and Sale, *State Taxation of Interstate Sales*, 46 Va. L. Rev. 1290, 1304 (1960); Note, 59 Mich. L. Rev. 441, 443 (1961).[5a]

2. The decision below is opposed to the only other State decision upon the question. In *State* v. *Lane Bryant Inc.*, 277 Ala. 385, 171 So.2d 91 (1965) the Supreme Court of Alabama squarely held that Alabama could not require an out-of-State mail order business to collect use taxes merely because of the interstate dissemination of advertising and delivery of goods to local residents. The applicable statute required collection of the tax by a seller who—

[5a] The present case is also one of first impression in another respect—it is the first in which jurisdiction to issue a judgment *in personam* is squarely an issue in a use tax case involving constitutional questions. In both *Nelson* cases, Sears Roebuck and Montgomery Ward had each qualified to do business in the taxing State. In the *General Trading* case the company voluntarily entered a general appearance. In the *Scripto* case the company was plaintiff seeking an injunction to restrain a distraint on accounts receivable. The *Miller Bros.* case was an *in rem* proceeding. In the present case, for the first time, the question is presented whether it violates due process of law to enter an *in personam* judgment against a company which has never entered the State and done anything except an interstate mail order business.

distributes catalogs or other advertising matter and by reason thereof receives and accepts orders from residents within the State of Alabama.

The Court held the statute inapplicable chiefly because its application to an exclusively mail order business would be unconstitutional: "the tests repeatedly laid down in successive decisions of the Supreme Court of the United States" (277 Ala. at 388, 171 So. 2d at 94) do not permit the taxing State "to make such a use tax collector" out of "a foreign seller which sent catalogs exclusively by mail to Alabama residents, and which accepted and filled orders outside the State of Alabama exclusively by mail" (277 Ala. at 387, 171 So. 2d at 93).[6]

3. To make out-of-State mail order businesses into collectors of the use taxes owed by customers in numerous States would subject them to fundamentally unfair burdens obstructing interstate commerce. There are now forty-two States with sales and compensating use taxes, twenty-one of which already have provisions apparently making advertising a sufficient nexus.[7] If the decision below is not reversed, all twenty-one are likely to begin enforcement and other States can be expected to expand their legislation.

The practical burdens would be overwhelming. Mail order businesses advertise throughout the United States. Some are substantial concerns, but most are very small. "It must be borne in mind, therefore, that efforts to subject

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[6] This decision was followed in *State* v. *Innkeepers Supply Co.*, 277 Ala. 476, 172 So.2d 40 (1965).

[7] On January 25, 1966, the date of the decision below, there were thirty-nine States with sales and use tax provisions, seventeen of which attempted to make advertising by catalog or otherwise a sufficient nexus. Since then, three more States have enacted sales and use taxes all with catalog advertising provisions, and one has amended her use tax to include a catalog provision. See p. 17 below.

mail order sales to taxation involve not only the few major houses but also a large number of much smaller businesses." *Report* 770. Acting as a tax collector for perhaps a score of States would entail a heavy burden for the large and an impossible burden for the small businesses. Separate records must be made and kept for each State. Taxes would have to be calculated at different rates according to the residence of the customer. There are wide variations in State laws, especially with respect to articles subject to and exempt from the tax. ". . . in all cases the charging and recording of sales tax is more complicated than in a retail store. One reason is, of course, the many States to which mail orders are sent from a single mail-order plant. Also, while the variety of rules as to taxation is unlikely to trouble a firm with a narrow range of items, sizable firms with broad lines may have to break down their order processing to enable clerks to specialize in groups of States." *Report* 771. Furthermore, while the local over-the-counter retailer can and does collect the tax, experience demonstrates that on mail-order sales a large percentage of the tax—ranging from 30 to 75 percent on the cash sales—can never be collected and therefore falls upon the vendors (*Ibid.*). These practical burdens could scarcely be borne if the statutes came to be enforced according to their terms following the decision of the Illinois courts. They have not been enforced only because the nexus treated as adequate below has generally been regarded as constitutionally insufficient. They are discriminatory against interstate commerce because no local business is required to serve as collection agent for more than one State.

It may be objected that since these burdens must be borne by out-of-State sellers who have local stores or local salesmen, it is no more unfair to require them to be borne by out-of-State mail order businesses. One can posit individual cases where the practical differences seem small.

Taking the two categories as groups, however, there are marked differences in the burden. Most businesses with a local sales force derive benefits from the local government to the support of which they are required to contribute. Their salesmen use the State's highways, enjoy its police protection, and carry on their business activities within the sphere of local concern substantially as if they were doing local rather than interstate business. Exclusively mail order businesses create no local problems and receive no local benefits. In addition, the concern with a local sales force has, by definition, a number of representatives within each State, who, if the management wishes, can deal with the problems of local taxation. Its situation is not necessarily different in this respect from the company which maintains a local office or outlet. The mail order house has no local representatives.

The rapid spread of sales and use taxes among county and municipal governments multiplies the disproportionate burdens which are put upon interstate commerce by the decision below. Twenty years ago only a handful of local governments imposed a sales tax; today, over 2,300 do so. Not only do the problems encountered with State use taxes recur at the level of local government where local taxes are permitted, but the burden of compliance would be many times the heavier because of the inaccessibility of tax information; because of the detailed paperwork involved in allocating mail order sales each to its proper county, city or town (sometimes even to its proper school or police district); and because of the sheer number of jurisdictions for which the work would have to be done. The situation has been tolerable only because it has been commonly assumed that the solicitation of orders by mail, followed by delivery in interstate commerce, is not a sufficient nexus to give jurisdiction to require collection and payment of the tax.[8]

[8] The above paragraph is based upon *Report*, ch. 27, p. 837 *et seq.*

The question presented has wide importance. According to the 1963 Census of Business there were 4,206 mail order establishments making almost $2,400,000,000 in sales.[9] The figures exclude specialty firms which solicit business by spot advertisements in national periodicals. The large mail order houses with nationwide retail outlets, while few in number, account for $1.1 billion in mail order sales. They pay the sales or use taxes. Where a firm does only a mail order business, however, collection or payment of sales taxes, including use taxes, is virtually unknown (except to the home State). *Report* 772. Nearly all of the 4,206 mail order businesses, therefore, and from a third to a half of the $2.4 billion volume is affected by the question. The present practice rests largely upon the view—correctly held, we believe—that to require collection of the tax in these circumstances is unconstitutional. The decision below, if unreviewed, would invite the forty-two sales and use tax States to change the present practice by administrative regulation or new legislation. The three States (Massachusetts,[10] Virginia[11] and New Jersey[12]) which have adopted sales and use taxes since the decision below have all included the catalog provision. One State, Rhode Island, has amended its statute since the decision below to insert a catalog provision.[13]

The net result would be an excessive burden upon interstate transactions and out-of-State businesses of a kind which the federal Constitution was designed to prohibit.

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[9] U.S. Bureau of the Census, Dept. of Commerce, 1963 Census of Business, Retail Trade, U.S. Summary, Table 1, p. 3 (Advance Report).

[10] Massachusetts Retail Sales Tax and Use Tax, ch. 14, Acts, 1966.

[11] New Jersey Sales and Use Tax Act, ch. 30, Laws of 1966.

[12] Virginia Retail Sales and Use Tax Act, Tit. 58, ch. 8.1, Code of Virginia 1950 as amended by ch. 151, Laws 1966.

[13] Rhode Island sales and use tax act, ch. 18 and 19 of Title 44 of the General Laws of Rhode Island, 1956, as amended by H.B. 1730, Laws 1966.

Conclusion

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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Appendix A

OPINION OF THE SUPREME COURT OF THE STATE OF ILLINOIS

Docket No. 39330—Agenda 24—November, 1965.

THE DEPARTMENT OF REVENUE, APPELLEE, v. NATIONAL BELLAS HESS, INC., APPELLANT.

MR. JUSTICE HOUSE delivered the opinion of the court:

Defendant National Bellas Hess, Incorporated, a non-resident mail-order vendor, appeals from a summary judgment entered by the circuit court of Cook County against it for the sum of $93,242.18, representing taxes of $74,593.75 assessed under the Illinois Use Tax Act, (Ill. Rev. Stat. 1961, chap. 120, pars. 439.1 *et seq.*,) for the period of July 17, 1961, through October 31, 1962, plus a 25% penalty of $18,648.43. Constitutional questions, as well as the public revenue, are involved.

There is no dispute about the following facts which are gathered from the pleadings. Defendant is a national mail order company. It issues annually two main catalogues, described as "Spring and Summer" and "Fall and Winter," and it also issues during the year a number of intermediate smaller "sales books" or "flyers." The catalogue contains approximately 4000 different items of merchandise for retail sale, and it is mailed to the company's own list of customers. This list, which contained 5,000,000 names when the company acquired it in 1932, is kept current with active and recent customers. The "flyers," which are less costly to distribute, are mailed to a less restricted list of customers or potential customers. They are occasionally mailed in bulk addressed to "occupant" or enclosed in the parcels sent to customers in filling orders from a prior "flyer" or catalogue.

The company's only plant is located in North Kansas City, Missouri, and all of its mail-order activities occur there, except for purchasing, which is done initially by a wholly owned subsidiary in New York. All of the catalogues and "flyers" are mailed from North Kansas City; orders from customers are received and accepted there; the goods are mailed or shipped by common carrier from there; and payment by the customer is mailed there.

The company is a Delaware corporation and is qualified to do business only in Delaware and Missouri. It does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells, it does not own any tangible property, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

Section 3 of the Use Tax Act, which became effective in July, 1955, imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." It also provides that the tax "* * * shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *." (Ill. Rev. Stat. 1961, chap. 120, par. 439.3.) The constitutionality of the act was adjudicated and a determination of its operating incidence was made by this court two years later. (*Turner* v. *Wright*, 11 Ill.2d 161.) Section 2 of the act, which defines various terms used in the act, was amended effective July 17, 1961, (the commencement date of the assessment here in question) by adding a new paragraph to the definition of a "retailer maintaining a place of business in this State." The new paragraph, referred

to as the "catalogue amendment", defines a "retailer maintaining a place of business in this State" as any retailer "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Ill. Rev. Stat. 1963, chap. 120, par. 439.2.

The Use Tax Act was also amended in July 25, 1961, by adding a new section, section 12a, which provides for substituted service of process on a nonresident falling within the definition of "retailer maintaining a place of business in this State." It provides that "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in the State within the meaning of Section 2 of this Act,* * * shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address." (Ill. Rev. Stat. 1961, chap. 120, par. 439.12a.) The section provides that this substituted service of process or notice "shall be of the same force and validity as if served upon the taxpayer personally within this State."

While defendant has raised a number of grounds for reversing the judgment entered against it, its two principle arguments are: (1) that the exercise of *in personam* jurisdiction by the circuit court in this proceeding constitutes a denial of due process of law under the Federal and

Illinois constitutions, (U.S. Const., Amend. XIV, sec. 1; Ill. Const. art. II, sec. 2,) and (2) that the Use Tax Act insofar as it requires that defendant collect the use tax from Illinois taxpayers is a denial of due process of law under the Federal and Illinois constitutions and violative of the commerce clause of the Federal constitution. (U.S. Const., art. I, sec. 8, cl. 3.) We consider first the constitutionality of requiring defendant to collect the Illinois use tax.

The Supreme Court has held that a State's power to impose upon a nonresident vendor the burden of collecting its use tax depends upon the amount of activities conducted by the nonresident vendor in the taxing State. (*American Oil Company* v. *Neill*, 380 U.S. 451, 14. L.ed.2d 1, 85 S.Ct. 1130; *Scripto Inc.* v. *Carson*, 362 U.S. 207, 4 L.ed. 2d 660, 80 S.Ct. 619; *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L.ed. 744, 74 S.Ct. 535; *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L.ed. 1309, 64 S.Ct. 1028.) "There must be * * * 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Scripto Inc.* v. *Carson*, 362 U.S. 207, 210-211, 4 L.ed.2d 660, 80 S.Ct. 619, 621.

Nelson v. *Sears Roebuck & Co.*, 312 U.S. 359, 75 L.ed. 888, 61 S.Ct. 586, involved the constitutionality of the Iowa use tax as applied to Sears mail order business conducted directly between customers in Iowa and Sears mail-order houses located outside Iowa. Sears was authorized to do business in Iowa and had retail stores there. The court upheld Iowa's power to impose this collector's liability against Sears on such mail orders against the attack that the exercise of such power denied Sears of due process of law under the fourteenth amendment and violated the commerce clause of section 8 of Article I of the constitution.

Nelson v. *Montgomery Ward*, 312 U.S. 373, 85 L.ed. 897, 61 S.Ct. 593, a companion case to *Sears Roebuck*, raised

the identical issue on almost the same facts as in *Sears Roebuck* and the court reached the same result. In the course of this opinion, however, the court stated: "There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner [Montgomery Ward & Co.] in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog.' *This stipulation clearly means that respondent has solicited mail order sales in Iowa.* [Emphasis added.] The fact that that solicitation was done through local advertisements rather than directly by local agents * * * is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state." 312 U.S. 373, 376, 85 L.ed. 897, 899, 61 S.Ct. 593, 595.

The same issue was again raised in *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L.ed. 1309, 64 S.Ct. 1028. That case also involved the Iowa use tax, but this time the vendor had never qualified to do business as a foreign corporation in Iowa nor did it maintain any office, branch or warehouse there. Orders were solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. Again, the court upheld Iowa's jurisdiction to impose liability on the nonresident vendor for collection of the use tax on property shipped by common carrier or the post into Iowa.

The question was again raised in *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L.ed. 744, 74 S.Ct. 535. *Miller Bros. Co.* only made sales directly to its customers in Wilmington, Delaware, and did not take orders by mail or telephone. Maryland's Court of Appeals held Miller Bros. Co. liable for the Maryland use tax on all goods sold in the Delaware store to Maryland residents whether the

goods were delivered into Maryland by common carrier, the vendor's truck or carried by the purchasers themselves. The U. S. Supreme Court held that advertising by Miller Bros. Co. with Delaware newspapers and radio stations which reached Maryland residents, its occasional sales circulars which were mailed to all former customers including customers in Maryland, and the occasional delivery of goods into Maryland did not constitute a jurisdictional basis for imposing the burden of collecting or paying the Maryland use tax on this Delaware vendor. In distinguishing the *General Trading* case the court said, "That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers *.* *. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." 347 U.S. 340, 346-347, 98 L.ed. 744, 749, 74 S.Ct. 535, 540.

The issue again came before the court in *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 4 L.ed.2d 660, 80 S.Ct. 619. The court held that solicitation by advertising specialty brokers who were not employees or agents of Scripto, the Georgia vendor, constituted a jurisdictional basis for imposing the burden of collecting or paying the Florida use tax on orders solicited by the brokers and filled by shipping the merchandise into Florida. After stating that the case was controlled by *General Trading Co.* the court distinguished the *Miller Bros. Co.* case by saying: "Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when

personally present at Miller's store in Delaware. * * * Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland." 362 U.S. 207, 212, 4 L.ed.2d 660, 664, 665, 80 S.Ct. 619.

From the foregoing cases it would appear that Mr. Justice Rutledge has gotten to the heart of the "what" and "why" that constitutes a jurisdictional basis for imposing on a nonresident vendor the burden of collecting the use tax on merchandise sold and delivered to residents of the taxing State. He said: "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading Co.* case it loses force altogether, for the Iowa statute defines this process in terms as 'a retailer maintaining a place of business in this state.' The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer." (Separate opinion concurring with *General Trading Company* v. *State Tax Commission* and *International Harvester Co.* v. *Department of Treasury*, 322 U.S. 340, 349, 88 L.ed. 1313, 1319, and dissenting to *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 349, 354, 88 L.ed. 1304, 1319, 1321.) In short, "continuous local solicitation followed by delivery of ordered goods to the customers"

apparently forms a constitutional basis for a "State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant." *Miller Bros. Co. v. State of Maryland,* 347 U.S. 340, 346, 98 L.ed. 744, 749, 74 S.Ct. 535, 540.

We do not think it important that defendant in this case solicits orders by catalogue and flyers rather than by local advertising as in *Montgomery Ward,* or by salesmen as in *General Trading Co.* or by brokers as in *Scripto, Inc.* The important question is whether there is "exploitation of the consumer market" by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues since the vendor will use that type of solicitation which most effectively and economically exploits the consumer market.

We believe the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogues and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

Defendant argues that the issue here is whether Illinois can impose its use tax on it and that this "issue cannot be obfuscated by gratuitous and euphemistic statements that Illinois is attempting to impose upon defendant only the duty of such tax collection." Section 3 of the Use Tax Act provides that the tax imposed on the purchaser-user is to be collected by the retailer. Section 8 provides that "the tax herein required to be collected by any retailer

pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State * * *." The effect of these two sections is that the tax is to be collected by the retailer; but if he fails to collect the tax, he himself is liable for its payment. The Florida statute under consideration in the *Scripto, Inc.*, case also imposed on the vendor the burden of collecting or paying the use tax. The court stated, "We note that the appellant is charged with no tax—save when, as here, he fails or refuses to collect it from the Florida customer," and went on to affirm the tax liability levied against Scripto, Inc. 362 U.S. at 211.

Defendant's other principle contention for reversing this judgment is that the exercise of *in personam* jurisdiction by the circuit court deprived it of due process of law. Defendant states that in none of the cases dealing with a State use tax and the imposition of collection liability has the issue been raised of whether substituted service of process on a nonresident vendor will give a court jurisdiction to enter an *in personam* judgment.

Thomas Reed Powell raised this issue in "Sales and Use Taxes: Collection from Absentee Vendors." (57 Harv. L.Rev. 1086 (1944).) He analyzed the problem of obtaining personal service on a nonresident vendor who does all his business by mail order or whose soliciting agents have left the State ahead of the process server and concluded that, "Such practical difficulties cannot as yet be minimized by applying to all foreign corporations engaged exclusively in interstate commerce the familiar statutes requiring the appointment of an agent or providing that the doing of business shall itself be a sufficient basis for service of process on a state official in causes of action arising out of business there done." (57 Har.L.Rev. 1086, 1088.) This conclusion was apparently correct when written, but we note that it was written a year before the

landmark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L.ed. 95, 66 S.Ct. 154.

In *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, we stated, "Under modern doctrine the power of a State court to enter a binding judgment against one not served with process within the State depends upon two questions: first, whether he has certain minimum contacts with the State [citation], and second, whether there has been a reasonable method of notification." (22 Ill.2d 432, 437). We consider first the question of minimum contacts with the State.

In the use tax cases heretofore considered the court speaks of the State's "jurisdiction or power to create this collector's liability." (See, e.g., *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 344, 98 L.ed. 744, 748, 74 S.Ct. 535, 538,) and turns the question of such jurisdiction or power on whether the nonresident vendor has "minimum connections" with the taxing State. (*Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 345, 98 L.ed. 744, 748, 74 S.Ct. 535, 539.) Thus, the power to render an *in personam* judgment against one not served with process within the State and the power to impose a collector's liability for the use tax on a nonresident vendor both depend on "minimum contacts" or "minimum connections" with the State. Whether the "minimum connections" which form the basis of jurisdiction to impose the collector's liability are sufficient to form the basis of *in personam* jurisdiction to enforce this liability has not, to our knowledge, been decided by the Supreme Court. It would be an anomolous situation, however, if a State had jurisdiction to impose this collector's liability but did not have jurisdiction to enforce it.

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 2 L.ed.2d 223, 78 S.Ct. 199, involved an action brought in California against a foreign insurance company on a policy

issued to a resident of California. The insurance company did not have any office or agent in California and never solicited or did any insurance business in California apart from the policy involved in the case. The insurance company was not served with process in California, but was notified by registered mail at its place of business in Texas, pursuant to a statute permitting such service in actions on insurance contracts. After referring to the *International Shoe* case and the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations," the court held that "it is sufficient for purposes of due process that the suit was based on a contract which had substantial connection" with California. 355 U.S. 220, 223, 2 L.ed.2d 223, 226, 78 S.Ct. 199, 201.

Hanson v. *Denckla*, 357 U.S. 235, 2 L.ed.2d 1283, 78 S.Ct. 1228, concerned the right to $400,000, part of the corpus of a trust established in Delaware by a settlor who later became domiciled in Florida. Delaware refused to accord full faith and credit to a Florida decree adjudicating the matter because the Florida court had not acquired jurisdiction over an indispensable party, the Delaware trustee. The trustee was not served with process in Florida, but was notified by ordinary mail and notice was published locally as required by the Florida statutes dealing with constructive service.

The court first noted that "the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L.ed. 565 to the flexible standard of *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 90 L.ed.2d 95, 66 S.Ct. 154." It then stated, "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * a defendant may not be called upon to do so [defend himself in a foreign tribunal] unless he has had the 'minimal contacts' with

that State that are a prerequisite to its exercise of power over him." The court proceeded to distinguish the "minimal contacts" present in the *McGee* case from the absence of "minimal contacts" in this *Hanson* case. "None of the trust assets has ever been held or administered in Florida, and the record discloses *no solicitation of business in that State either in person or by mail.* * * * In *McGee*, the nonresident defendant *solicited* a reinsurance agreement with a resident of California. * * * But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the [trust] agreement as the *solicitation* in *McGee.*" (Emphasis added.) 357 U.S. 234, 251-252, 2 L.ed.2d 1283, 1296, 78 S.Ct. 1228, 1238-1239.

Thus, solicitation which is of prime importance in satisfying the "minimal connections" requirement in the use tax cases is of equal importance in satisfying the "minimal contacts" requirement necessary for the exercise of *in personam* jurisdiction with substituted service of process. Also significant is the fact that the solicitation, which was so important in the *McGee* case, was by mail. (See also, *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 94 L.ed. 1154, 70 S.Ct. 927.) We hold that defendant's continuous local solicitation for mail orders followed by delivery of the ordered goods to customers in Illinois constitute the "minimal contacts" between defendant and Illinois that are requisite to the exercise of *in personam* jurisdiction over it.

This brings us to the question of whether section 12a provides a reasonable method of notification. The section states that a true and certified copy of the process or notice shall be sent to the taxpayer by registered or certified mail at his last known address. In the *International Shoe Co.* case the court said, "Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to

apprise appellant of the suit." (326 U.S. 310, 320, 90 L.ed. 95, 104, 66 S.Ct. 154, 160.) We are of the opinion that section 12a gives the person to be served or notified "a realistic opportunity to appear and be heard." See *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 436.

The record shows that on January 21, 1963, a certified copy of the notice of proposed assessment was sent by registered mail addressed to defendant's North Kansas City office. On June 26, 1963, a certified copy of final assessment was sent by registered mail addressed to defendant's North Kansas City office and on January 23, 1964, a certified copy of *alias* summons, with a copy of the complaint attached, was sent by registered mail to defendant's North Kansas City office. Defendant did not respond to the notice of proposed assessment or final assessment, but it did make a special appearance to contest the jurisdiction of the circuit court. There is nothing in the record to show that defendant did not have adequate notice or sufficient time to prepare its defenses and appear.

Defendant also argues that section 12a does not apply to it. To support this argument it first points out that the section states, "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State * * *." Defendant then contends that it receives no privilege from Illinois.

The plain intent and meaning of section 12a is to provide a method of substituted service on a nonresident "acting as a retailer maintaining a place of business in this State within the meaning of Section 2." Whether Illinois extended the "privilege" or defendant accepted the "privilege" is academic because, as we have pointed out, defendant is "maintaining a place of business in this State

within the meaning of Section 2" and the application of 12a to defendant did not deprive it of due process of law.

Also in support of its argument that section 12a is not applicable to it, defendant points out that the section provides for mailing a copy of the notice or process "to the taxpayer * * * addressed to such taxpayer at his last known address." Since defendant is a collector of the tax rather than a "taxpayer" it concludes that the section does not apply to it.

As we just pointed out, section 12a provides a method of substituted service on persons who have incurred a liability under the Use Tax Act. The section clearly provides in the first sentence that it is to apply to (1) nonresident vendors, (2) resident vendors who subsequently move from the State or conceal their whereabouts and (3) resident or nonresident users who move from the State or conceal their whereabouts. The section thereafter uses the word "taxpayer" in a generic, and not in a technical, manner to cover all three categories of persons who may have incurred liability under the act and cannot be served with process in the State. The section clearly applies to defendant.

The constitutional issues argued by *amici curiae* are essentially the same as those argued by defendant. They do contend, however, that equal treatment has not been accorded resident and nonresident vendors with regard to their respective liabilities under the Retailers' Occupation Tax Act and the Use Tax Act on credit sales. Since there is nothing in the record concerning credit sales, we need not consider this question. Nor will we consider a memorandum of the Department of Revenue concerning sales for resale and its effect on manufacturers and wholesalers, since there are no sales for resale involved in this case.

The remaining questions raised by defendant can be disposed of summarily. Defendant argues that the com-

plaint should have been dismissed because the verification was not personally signed by Harry L. Hulman, Director of the Department of Revenue. Verification of the complaint was not necessary. (Ill. Rev. Stat. 1961, chap. 110, par. 35.) It also argues that the trial court erred in entering a summary judgment because there were genuine issues of material fact raised by the pleadings. Defendant does not state what those issues are and our examination of the pleadings does not reveal any such issues. It is also argued that summary judgment should not have been entered because two affidavits of Director Hulman were not personally signed by him and the affidavit of Attorney General William G. Clark consists only of argument and conclusions of law. As we just mentioned, the pleadings do not show any genuine issues of material fact.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Appendix B

JUDGMENT OF THE SUPREME COURT OF THE STATE OF ILLINOIS

Be it remembered, that, to-wit: on the 25th day of January 1966, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS,
APPELLEE

No. 39330 vs.

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT

Appeal from
Circuit Court
Cook County
63 C 21015

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County

aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed by name and affixed the Seal of said court this 29th day of March, 1966.

(SEAL)

(s) Mrs. Earle Benjamin Searcy,
Clerk,
Supreme Court of the State of Illinois.

Appendix C

STATUTES INVOLVED

A.) The ILLINOIS USE TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 439.1 *et seq.*), insofar as it is sought by plaintiff to be applied to defendant in the attendant circumstances. The Court's attention is directed especially to Sections 2, 3, 3a, 5, 6, 7, 8, 9, 12, 12a and 14 of such Act.

Section 2 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.2, as amended by the Act of July 17, 1961):

> "*439.2 Definitions.*] § 2 'Use' means the exercise by any person of any right or power over tangible personal property incident to ownership of that property, • • •. 'Use' shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property • • •.
>
> " 'Purchase at retail' means the acquisition of the ownership of or title to tangible personal property, through a sale at retail.
>
> " 'Purchaser' means any person who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.
>
> " 'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for use and not for resale in any form as tangible personal property, for a valuable consideration.• • •.
>
> "• • • • • •
>
> " 'Retailer maintaining a place of business in this State,' or any like term, shall mean and include any retailer:

1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or

2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising whether such orders are received or accepted within or without this State."

Section 3 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 110, § 439.3):

"*439.3 Tangible personal property purchased at retail—Use tax—Rate—Collection and remittance—Exceptions.*] §3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Such tax is at the rate of 2½% of the selling price of such property if purchased before July 1, 1959, or after June 30, 1965, and at the rate of 3½% of the selling price of such property if purchased after June 30, 1959, and prior to July 1, 1965 * * *

"The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *, and remitted to the Department [of Revenue], pursuant to the provisions of Section 9 hereof.

"The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

"Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. * * *

" * * * * * *"

Section 3a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.3a):

"*439.3a Method of stating tax.*] § 3a. Wherever possible the tax imposed by the Act shall when collected be stated as a distinct item separate and apart from the selling p. e of the tangible personal property.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.5):

"§ *439.5 Receipts—List of agents.*] § 5. * * * every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made in or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser, give to the purchaser (if demanded by the purchaser) a receipt therefor in the manner and form prescribed by the Department [of Revenue]. * * *."

Section 6 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.6):

"*439.6 Certificate and Sub-Certificate of Registration—Separate certificates—Foreign retailers—Permit to collect tax.*] § 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, * * *. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department [of Revenue] (upon a form prescribed

and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the applicant states in his application to be the principal place of business or location from which he will act as a retailer in this State.* * *. No Certificate of Registration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

"The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements * * * as a retailer maintaining a place of business within this State.* * *."

Section 7 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.7):

"*439.7 Direct or indirect advertisement that retailer will absorb tax prohibited—Penalties.*] § 7 It is unlawful for any retailer to advertise or hold out or state to the public or any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed

by Section 3 hereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added, that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a claim filed with the Department [of Revenue] under the Retailers' Occupation Tax Act or under this Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act."

Section 8 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.8):

"*439.8 Tax collected as debt owed to state—Exception.*] § 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [of Revenue] by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction."

Section 9 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.9):

"*§439.9 Due date—Conditional sales—Refunds—Joint and separate returns—Fund.*] § 9 * * * each retailer required or authorized to collect the tax herein imposed shall pay to the Department [of Revenue] the amount of such tax (except as otherwise provided), on or before the last day of the month following the calendar month during which such tax was collected, less a discount of 2% or $5 per calendar year, which-

ever is greater, which is allowed to reimburse the retailer for expenses incurred in collecting the tax, keeping records, preparing and filing returns, remitting the tax and supplying data to the Department on request.* * *.

"* * * * * *"

Section 12 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12):

"*439.12 Applicable sections and exceptions.*] § 12. All of the provisions of Sections 2a, 2b, 3, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c, 5d, 5g, 5h, 8, 9, 10, 11, 12 and 12½, of the 'Retailers' Occupation Tax Act' in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Section 12a provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 439.12a, as added by the Act of July 25, 1961):

"*439.12a Appointment of secretary of state for service of process—Force and effect of service.*] § 12a. Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act, and any resident of this State who incurs tax liability under this Act as a seller and who subsequently removes from this State or conceals

his whereabouts, and any person (resident or non-resident) who incurs tax liability under this Act as a user in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like true and certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address.

"Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the taxpayer personally within this State. Proof of such service upon the taxpayer in this State through the Secretary of State as his agent and by mailing to the last known address of the taxpayer may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or by his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit."

Section 14 provides, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 14):

"*439.14 Violations—Penalties.*] § 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of

Section 9 or Section 10 hereof, or who fails to keep books and records as reqquired herein, or who files a fraudulent return, or who wilfully violates any rule or regulation of the Department [of Revenue] for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

"Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

" • • • • • "

"This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupational Tax Act."

B.) The ILLINOIS RETAILERS' OCCUPATION TAX ACT, as amended (Ill. Rev. Stats. [1963], Ch. 120, §§ 440 *et seq.*), insofar as it is sought by appellee to be applied to appellant in the attendant circumstances.* The Court's attention is directed especially to Section 5 of such Act.

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*In this regard, see Section 12, Illinois Use Tax Act, *supra*.

Section 5 provides, in pertinent part, as follows (Ill. Rev. Stats. [1963], Ch. 120, § 444):

"444. *Failure to make return—Failure to pay tax.*]

* * * * * *

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return, the Department [of Revenue] shall determine the amount of tax due from him according to its best judgment and information, which amount so fixed by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown in such determination. * * *. The Department shall notify such person or his legal representative, as such, as provided in this Act, of the amount of tax so computed, stating that it proposes to assess such amount together with a penalty of 25% thereof. * * *. If a protest to the proposed assessment and a request for a hearing thereon is not filed 20 days after notice of the proposed assessment, the Department shall issue a final assessment to such person or to the legal representative of such person.

"* * * * * *"

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